No. 15,523

United States Court of Appeals

For the Ninth Circuit

DANIEL L. ABDUL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Cr. No. 11,072.

BRIEF FOR APPELLEE.

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JURISDICTION.

The District Court had jurisdiction at the trial of this case under 18 U.S.C. § 3231, and Rule 18, Federal Rules of Criminal Procedure. After conviction on six out of twelve counts of the Indictment, a timely appeal was taken by the Defendant and the jurisdiction of this Court to review the judgment of the District Court is invoked under 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE.

An Indictment containing twelve counts was returned against Appellant in the United States Dis-

trict Court for the District of Hawaii on August 16, 1956 under §§ 2707(b) and (c) of the Internal Revenue Code of 1939, and §§ 7202 and 7203 of the Internal Revenue Code of 1954 charging him, as President and General Manager of Home Furniture Co., Ltd., a Honolulu corporation employing labor, with willfully, and knowingly failing to make to the District Director of Internal Revenue at Honolulu, Employer's Quarterly Federal Tax Returns of Wages Withheld from his employees for the payment of Federal Income Taxes and Federal Insurance Contribution Act Taxes, and with willfully failing to truthfully account for and pay over said taxes to the District Director on the dates and for the amounts as follows (R. 3-15):

Counts I and II	Jan. 31, 1954	$2,987.58
Counts III and IV	Apr. 30, 1954	2,095.81
Counts V and VI	July 31, 1954	1,794.36
Counts VII and VIII	Oct. 31, 1954	1,796.85
Counts IX and X	Apr. 30, 1955	1,601.69
Counts XI and XII	July 31, 1955	1,380.87

Appellant pleaded not guilty to each count of the Indictment on September 21, 1956 (R. 298). The case was tried by jury before the Honorable Jon Wiig, U.S. District Judge, on November 26 through 30, and December 3 through 5, 1956 (R. 298-302). On December 5, 1956 the jury returned a verdict of guilty as to each of the odd numbered counts and not guilty as to each of the even numbered counts (R. 295, 302). The usual motions were made by the Defendant, first after the termination of the Plaintiff's case, then

after all the evidence was in, and subsequently following the verdict. Each was denied in turn (R. 300, 301, 302), and judgment was rendered against the Defendant on January 11, 1957 (R. 303). Notice of appeal was filed on January 14, 1957 (R. 303).

Although Appellant makes no point of the sufficiency of the evidence in his appeal to this Court, he has gone to great lengths in his statement of the case to set forth the "facts" relating to the general issue which would place him in the most favorable light in this Court and has designated piecemeal certain portions of the record apparently for this purpose.

When served with Appellant's Statement of Points to be Relied Upon on Appeal, and Designation of Record on Appeal to be Printed, Appellee was placed in somewhat of a dilemma in determining just exactly what the purpose was in designating those certain portions aforesaid and in turn what additional portions of the record it was necessary to designate. Unless some good purpose appeared therefor a counter-designation of the whole record would have been excessive and would have resulted in a very expensive printing bill. For this reason Appellee singled out a few portions of the record which countered to some degree those portions designated by Appellant relating to the merits of the case and filed its Counter-Designation in this Court on April 22, 1957.

It was anticipated that Appellant intended to represent to this Court that the tax returns involved in this case were filed and the taxes ultimately paid vol-

untarily by him. This supposition is borne out in Appellant's Opening Brief, pages 5 through 7. Consequently, Appellee designated as Item No. 6 of its additional portions of the record material to consideration on appeal certain testimony of George D. Stratton (R. 179, 180), in order to demonstrate to the contrary, i.e., that the record showed the returns were filed under duress and the taxes were collected by distraint after a great deal of effort on the part of the Internal Revenue Agents. A review of all of the testimony would be necessary to obtain the true picture.

Appellant, not to be outdone, filed a third Designation herein on or about April 24, 1957 calling for additional testimony of George D. Stratton to be printed (R. 181-186). This third Designation which was filed by Appellant was not in compliance with any of the rules of this Court, specifically, Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit. If this practice were allowed to continue, presumably the parties could designate and counter-designate ad infinitum.

Upon a review of the whole record Appellee contends that a statement of the case could be drawn fairly describing the Appellant as an extremely dishonest and unscrupulous man in the operation of his business, and in particular in his relations with the Internal Revenue Agents. Suffice it to say, Plaintiff's Requested Instruction No. 8 (R. 22, 23) contains a very brief but adequate summary of some of the evidence contained in the whole record to this effect.

Most of the comment contained therein is substantiated by the limited portions of the record which have been printed herein, specifically pages 66, 72, 73, 76, 92, 93, 196, 145, 146, 160, 68, 69, 179, 180, 98-101, 147, 148, 58, 97, 84, 85, 169, 171-173, 211, 213, and Plaintiff's Exhibits numbered 3, 8, 18, 19, 22 and 23, and Defendant's Exhibit "H". The aforesaid Instruction was offered in good faith and was refused solely on the ground that the Court declined to comment on the evidence (R. 240, 241), even though this type of instruction has been given consistently in tax cases, on the authority of *Spies v. U. S.,* 317 U.S. 492. See *Forster v. U. S.*, 9 Cir. 1956, 237 F. (2d) 617, 619-20.

With the foregoing preliminary comment we will state briefly the case:

Appellant, during the period covered by the Indictment, was President and General Manager of Home Furniture Co., Ltd. a Honolulu corporation. He operated the business more like a sole proprietorship.

In connection with the delinquencies involved herein, timely tax returns and checks in payment thereof were prepared by Appellant's bookkeeper and placed on his desk for signature and mailing to the District Director of Internal Revenue. In each case the Appellant declined to mail the return and remittance, ostensibly because he did not have sufficient cash on hand to satisfy all of the Company's current obligations and elected to satisfy others rather than pay the taxes. He was advised by his bookkeeper that he could file the returns without payment al-

though a penalty would ensue, howewer, for his own reasons he elected not to do so. There is ample evidence from which it could be concluded that he did not file the returns without payment in order to keep from the Internal Revenue Agents the information from which they could assess the tax and collect it by distraint.

Soon after the first delinquency the Internal Revenue Agents began their extensive inquiries, both in person and by telephone, which continued over the better part of two years. Appellant represented to the Agents that the returns had been filed, or had been mailed, and if they hadn't been received they must have been lost, or at least he didn't know what had happened to them. When such representations were made Appellant well knew that the returns which had been prepared, were and continued to remain in a folder on Appellant's desk. Through such misrepresentations, and others, the Appellant was able to sidestep the Revenue Agents and avoid the collection of his taxes for as long as two years. In each instance duplicate returns were ultimately made upon the insistence of the Internal Revenue Agents so that the taxes could be assessed and the money collected, which was eventually accomplished through distraint.

Although the Appellant represented inability to pay as his excuse for failing to file and pay, the Company bank accounts showed that during the period covered by the six quarters involved, when a total of $11,657.16 in withholding taxes was required

to be held in trust under the law, receipts of the Company in the amount of $379,278.02 were disbursed by it for other obligations (R. 84, 85, 169, 171-173, 211, 213, and Plaintiff's Exhibits 22 and 23). And during this very same period, out of these amounts, approximately $82,784 accrued to the benefit of the Appellant individually through loans and withdrawals, and salaries to himself and to his wife (R. 98-101, 147, 148, 58, 97, Plaintiff's Exhibits 15-19, 28, and Defendant's Exhibit "H").

During the course of the trial, as part of the Plaintiff-Appellee's case, one James Walker was called to testify to a conversation held with the Defendant on February 1, 1955, during the period encompassed by the Indictment, reflecting the attitude of the Defendant toward taxes due to the United States (R. 174-176). Appellant moved to strike this testimony, which motion was denied, and then moved for a mistrial, which motion was also denied (R. 177, 178). Appellant assigns as error the denial of these motions as well as the refusal of the Court to give Appellant's proposed Instruction No. 48 (R. 20) relative to this testimony.

Subsequently the Defendant took the stand and on cross-examination was questioned in detail with respect to his business practices during the period covered by the Indictment for the purpose of impeachment and to test his credibility and to demonstrate his unscrupulousness in carrying on his business as it might reflect upon his intent in failing to file the Company's tax returns and pay its taxes (R. 198-

210). Appellant assigns the allowance of these questions as error.

At the termination of the evidence Plaintiff submitted twenty-two proposed instructions and the Defense submitted fifty-four (R. 301). The settling of the Instructions resulted in a great deal of debate between counsel (R. 214-261). The majority of this centered around the definitions of the word "willfully" as contained in the statutes and in the Indictment, and the distinction, if any, between the definition of the word as applied to the odd counts or the misdemeanor counts and the even counts or the felony counts under the two different statutory sections in light of the decisions in *U. S. v. Murdock,* 290 U.S. 389; *Spies v. U. S., supra,* and others. Although involved herein were different felony sections of the statute which have never been construed by the Supreme Court, the Plaintiff-Appellee, out of an abundance of caution and in view of the *Spies* case, submitted its proposed Instruction No. 7 (R. 20, 21) which incorporated the more stringent definition of the word "willfully" with respect to the felony counts contained in the Indictment (R. 20-22). The Court adopted the distinction and accepted the proposed definition as applicable with respect to the misdemeanor counts. Appellant assigns as error the giving of the less stringent instruction on the definition of "willfully" with relation to the misdemeanor counts upon which he was convicted. The significance of this issue is pointed up by the fact that the jury acquitted him on the felony counts.

Appellant also assigns as error the giving of Plaintiff's Requested Instruction No. 22 (R. 25), a general admonition to the jury.

Although there are numerous other assignments of error contained in Appellant's Statement of Points to be Relied Upon on Appeal (R. 308-310), since they have not been treated in Appellant's Opening Brief it is assumed that they have been abandoned.

ARGUMENT.

SUMMARY.

1. (a) The instruction as given herein and as quoted below with respect to the misdemeanor counts in the Indictment of which the Appellant was convicted, taken together with all the other instructions, was a correct statement of the law and properly submitted to the jury in the abstract the question of the wilfullness of the Appellant in failing to file the required tax returns:

> "The word 'wilful,' as used in Counts I, III, V, VII, IX, and XI, that is, in failing to make a tax return, means with a bad purpose or without ground for believing that one's act is lawful, or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act."

(b) Appellant's requested instructions numbered 37, 38, 40, 41, 42, 45 and 46, the refusal to give which he complains of as error, were unnecessary in view of

the instructions given and inappropriate because unsound in law.

2. The giving of Plaintiff's Requested Instruction No. 22 taken with all the other instructions did not erroneously appeal to the jury to convict the Appellant and is not shown to have affected the substantial rights of the Appellant. Moreover, the giving of the instruction was not validly objected to at the trial on the grounds now stated.

3. The testimony of James Walker relative to the admissions of the Defendant was relevant and directly material to the principle issue of intent and willfulness and was properly offered by the Government for this purpose.

4. The questions asked the Defendant on cross-examination which were answered over objection were appropriate for the purpose of impeachment and to demonstrate his methods of carrying on his business as they might reflect on his intent and willfulness in failing to file the Company's tax returns and pay its taxes, and the jury was properly instructed in this regard.

I.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF THE TERM "WILLFULLY" AS USED IN THE ODD OR MISDEMEANOR COUNTS OF THE INDICTMENT ON WHICH THE APPELLANT WAS CONVICTED.

In addition to the standard form of instructions relative to intent, state of mind, and motive, etc., the Court gave the following instructions pertinent to the

question of willfulness in relation to the odd or misdemeanor Counts:

> "An Act is done or omitted knowingly if done or omitted voluntarily and purposely and not because of mistake or inadvertence or other innocent reason. An act is done wilfully if done voluntarily and purposely and with specific intent to do that which the law forbids. An omission to act is done wilfully if done voluntarily and purposely and with the specific intent to fail to do that which the law requires to be done. A person who knowingly does an act which the law forbids or who knowingly fails to do an act which the law requires, purposely intending to violate the law, acts with specific intent." (R. 268).
>
> * * * * * * *
>
> "Now, as to the other counts of the indictment, one, three, five, seven, eight (sic.) and eleven, generally speaking, what I have just read to you is applicable with this limitation on the definition of the word 'wilful' in failing to make a tax return. In that connection it means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard of whether one has a right so to act." (R. 269).
>
> * * * * * * *
>
> "You are instructed that if from the evidence you find that the defendant did not file tax returns at the time or times required by law (or that he did not pay the tax required by law), such failures in themselves do not constitute wilfulness under the law, unless you find that the filing (and paying) late of such taxes were acts with a bad purpose or an evil motive. If the

> Government's proof goes no further than to establish a state of facts for (sic.) which the inference of untruthfulness or wilfulness may not (sic.) be reasonably drawn, then the Government has failed to establish the charges beyond a reasonable doubt, and under such circumstance it would be the duty of the jury to acquit the defendant." (R. 274). [Appellant's proposed Instruction No. 35].

Following objections made by Appellant's counsel, the Court gave the following additional instructions:

> ". . .
>
> " . . . The word 'wilful' as used in counts 1, 3, 5, 7, 9, and 11, that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act. With regard to the other counts, 2, 4, 6, 8, 10 and 12, I supplement my instructions on the definition of wilful in the following language: An act is done wilfully if done voluntarily and purposely and with a specific intent to do that which the law forbids. Wilfulness implies a bad faith and an evil motive." (R. 287, 288).

After deliberating for a while the jury inquired further as to the meaning of "willfully" and the Court gave the following instruction:

> "The word 'wilful' as used in counts 1, 3, 5, 7, 9 and 11, that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without

> reasonable cause, or capriciously or with a careless disregard whether one has the right so to act. The word 'wilful' as used in counts 2, 4, 6, 8, 10 and 12, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct. Further, with respect to these counts, wilfulness implies bad faith and an evil motive." (R. 290, 291, 292).

Later the jury made inquiry regarding the instructions on the word "willfully" pertaining to Counts II, IV, VI, VIII, X and XII, that is, the even Counts, and the Court again instructed them in the same words as above, limiting the instruction to the definition of the word "willful" as it applied to the even Counts, i.e., omitting the first sentence above (R. 293).

In *U. S. v. Murdock,* 1933, 290 U.S. 389, the Supreme Court had occasion to analyze the meaning of the word "willfully" as it was used in Section 1114(a) of the Revenue Act of 1926, and Section 146(a) of the Revenue Act of 1928, both of which sections are in the identical words of Section 2707(b) of the Internal Revenue Code of 1939 involved herein. The Court stated at 290 U.S., pages 394 and 395:

> ". . . when used in a criminal statute it [wilfully] it generally means an act done with a bad purpose (cit); without justifiable excuse (cit); stubbornly, obstinately, perversely, (cit) . . . without ground for believing it is lawful (cit), or conduct marked by careless disregard whether or not one has the right so to act (cit)."

And later on when dealing with the word "willfully" as applied to the felony sections of the Internal Revenue Statutes, the Supreme Court stated in *Spies v. U. S., supra,* 317 U.S. at pages 497-498 and 499:

> ". . . willful as we have said, is a word of many meanings, its construction often being influenced by its context. U. S. v. Murdock, 290 U.S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness."
>
> * * * * * * *
>
> "Willful but passive neglect of the statutory duty may constitute the lesser offense, . . ."

In *U. S. v. Di Silvestro,* 1957, 147 F.Supp. 300, 304, Judge Lord of the Eastern District of Pa. had occasion to address himself to this question in analyzing the sufficiency of the evidence of willfulness in a "failure to file" case. He too interpreted *Spies* as calling for a dual standard between misdemeanor and felony cases:

> "The essentials of willfulness are seldom successfully defined, in these tax cases, in the abstract, see Forster v. United States, 9 Cir., 1956, 237 F.2d 617, 619; Murdock v. United States, 1933, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381. That the present 'lesser offense' of a misdemeanor requires a showing considerably less positive than required for a conviction under the felony statute counterpart of the act here in question, 26 U.S.C.A. § 7201, formerly § 145(b), is neverthe-

less clear, Spies v. United States, 1943, 317 U.S. 492. . . ."

In *U. S. v. Murdock, supra,* the trial court refused to submit to the jury the bona fides of the Defendant's refusal to give information to the Internal Revenue Agents as required by the statute on the ground of self-incrimination and possible prosecution under State statutes but to the contrary in effect directed the jury to return a verdict of guilty. See also *U. S. v. Morisette,* 342 U.S. 246.

A similar issue was presented, where the penalty section of the statute § 2707(a) of the Internal Revenue Code of 1939, was involved, in *Kellems v. U. S.,* D.C. Conn. 1951, 97 F.Supp. 681. In that case Miss Kellems had taken the position that she was not responsible for the penalty because she had refused to withhold the tax on the ground that the statute was unconstitutional. The analogy between this situation and that involved in *Murdock* is at once apparent. Judge Hincks defined the meaning of the word "willful" in the statute as " 'without reasonable cause', that is to say, 'capricious' ", 97 F.Supp., page 682. He then went on to summarize the evidence to determine whether or not the actions of Miss Kellems based on her stated position that the law was unconstitutional were in fact in good faith, or conversely, whether the refusal to withhold the tax was "without reasonable cause".

The requirement of *Murdock* is that the term "willful" be defined to mean something more than mere carelessness or negligence or inadvertence. *Pappas v.*

U. S., 10 Cir. 1954, 216 F.(2d) 515, 519. There is no question but that the instruction given here by the trial court satisfied the test. The words "with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act" are either identical to, synonymous with, or in the same category of meaning as the words used in summary by the Supreme Court in *Murdock* to define the word "willful". The selection of the particular words in this case at the trial level was made in order to adopt the ones most descriptive of the conduct of the Defendant as demonstrated by all the evidence. At the same time no comment was made on the evidence by the trial judge (R. 240-241, 275).

It should also be pointed out that the possibility of carelessness or negligence or inadvertence is negatived in the Indictment which in each instance alleges that the Defendant "well knowing his duty and obligation to make such return, did willfully and knowingly fail to. . . ." (R. 4-14). See *Nickell v. U. S.,* 9 Cir. 1908, 161 Fed. 702, 706. Moreover, the Court instructed the jury that "an act is done or omitted knowingly if done or omitted voluntarily and purposely and not because of mistake or inadvertence or other innocent reason" (R. 268).

With the exception of *Yarborough v. U. S.,* 4 Cir. 1956, 230 F.(2d) 56, cert. den. 351 U.S. 969, none of the cases cited by Appellant (Br. 25) supports his contentions with respect to the issue of willfulness and the proper definition thereof as applicable to a

"failure to file" case. Each of those cases involved tax evasion, wherein the requirements of the *Spies* case, *supra,* must be satisfied. But *Spies* is not in point when considering the proper definition of willfulness in a "failure to file" case, with the exception of the dicta therein cited above. *Pappas v. U. S., supra,* 216 F.(2d) at page 519.

In *Yarborough v. U.S., supra,* the Court approved the following instructions as applicable to willful failure to file tax returns:

> ". . . the word 'wilful' when used in a criminal statute means an act done with a bad purpose, or one done without justifiable excuse, or one done stubbornly, or obstinately, perversely, with a bad motive".

Although the Courts quite often include as part of the definition of the word "willful" as applicable to tax statutes, the terms "evil motive", or "bad motive", it is believed that the use of the word "motive" should best be avoided in instructing on the question of willfulness and criminal intent. In this regard the standard instruction which has been given with approval time and time again in criminal cases was given by the trial judge in this case (R. 269):

> "Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done. Personal advancement and financial gain are two well recognized motives for much of human conduct. These laudable motives may prompt one person to volunteer acts

> of good, another to volunteer acts of crime. Good motive alone is never a defense where the act done is a crime. If a person intentionally does an act which the law denounces as a crime, motive is immaterial except insofar as evidence of motive may aid in determination of the issue as to intent."

A careful reading of *Murdock* indicates that the descriptive term "evil motive" is merely used to define the converse of good faith and therefore is merely a general characterization of the previously summarized definition of the word "willfully" as found at pages 394 and 395 of 290 U.S., and as used in substantially the same form in the instructions in this particular case.

Appellant again relies on his carefully selected portions of the record referred to above in his Statement of Facts and contends that, based thereon, the issue of the bona fides of his delinquencies should have been submitted to the jury and that an issue of good faith was raised thereby. It is submitted that the question of whether any substantial issue of that nature is involved would require a review of the entire record which the Appellant has failed to designate. 4A C.J.S., *Appeal and Error,* § 1182b, page 1306; *Sharp v. U. S.,* 5 Cir. 1922, 280 Fed. 86, 89, cert. den. 260 U.S. 730. See *Yarborough v. U. S., supra,* 230 F.(2d) at page 60.

The only scintilla of evidence which might raise the question of good faith is the excuse Appellant gave on the stand, that he did not file his returns

because he did not have the money to pay the taxes and thought the taxes must be paid when the returns were filed. In the same breath he admitted lying to the Internal Revenue Agents by representing to them upon inquiry that the returns had been mailed (R. 196). And he made the statement in the face of the testimony of his own bookkeeper, Mr. Watanabe, that he had been advised that the payment need not accompany the return (R. 86, 133). This, together with all the overwhelming evidence appearing in the record as a whole, most of which is not now before this Court, clearly established that this defense had no substance to it whatsoever.

But even giving Appellant the benefit of the doubt on the record that is now before this Court, he cannot complain for other reasons. Inability to pay the taxes is not a good legal reason for failure to file a tax return, although such evidence is admissible and may be considered along with all the other evidence in the case in determining whether the delinquent's action in failing to file the returns was willful. *Yarborough v. U. S., supra,* 230 F.(2d) at page 60; *U. S. v. Di Silvestro, supra,* 147 F.Supp. at page 304. This does not necessarily mean that the Court is obligated to instruct the jury specifically on this isolated subject, particularly where the Court has declined to comment on the evidence. *U. S. v. Herskovitz,* 2 Cir. 1954, 209 F.(2d) 881, 886. As indicated above it is clear from the *Murdock* case that the question of good faith is negatived by the type of instruction given herein and the definitions of the word "willfulness" as appear

in that case. And so long as those definitions are a correct statement of the law, approved by the Supreme Court, there is no requirement that the Appellant be allowed numerous proposed instructions, in many cases incorrectly stating the law, *Blalack v. U. S.*, 6 Cir. 1946, 154 F.(2d) 591, 597, cert. den. 329 U.S. 738, reh. den. 329 U.S. 828; and each invitation to acquit. *Forster v. U. S.*, 9 Cir. 1956, 237 F.(2d) 617, 621.

Moreover, after instructing the jury on the subject of willfulness and intent as follows:

> " . . . An omission to act is done wilfully if done voluntarily and purposely and with the specific intent to fail to do that which the law requires to be done. A person who . . . knowingly fails to do an act which the law requires, purposely intending to violate the law, acts with specific intent." (R. 268),

the trial judge went on to give the general instruction on the proof of intent by circumstantial evidence and ended with the following:

> "In determining the issue as to the intent, the jury is entitled to consider *any statements made* and acts done or omitted *by the accused* and all facts and circumstances and evidence which may aid in determination of the state of mind." (Emphasis added) (R. 268, 269).

This was a general instruction without any unnecessary comment on the evidence which placed the bona fides of Appellant's delinquencies before the jury.

With the foregoing in mind, we should examine the proposed instructions set forth by the Appellant, the refusal to give which he complains of as error.

First of all it should be reemphasized that at the settling of instructions the Court went on record as declining to comment on the evidence (R. 240-241). This occurred in connection with Plaintiff's proposed Instruction No. 8 (R. 22, 23). In addition to refusing Plaintiff's proposed Instruction No. 8 on this ground, the Court also refused, apparently for the same reason, Plaintiff's proposed Instruction No. 10, and the second paragraph of Plaintiff's proposed Instruction No. 11 (R. 24, 247). This policy was followed consistently throughout the settling of instructions and as a result nowhere in the instructions as given does there appear any comment on the evidence. Moreover, the Court announced this position to the jury (R. 275). Therefore, so long as the legal definitions given in the instructions were correct, the Appellant cannot complain of the refusal to give his proposed Instructions numbered 40, 41, 42 and 45 (R. 17-19), inasmuch as each of those involved comments on the evidence. *U. S. v. Herskovitz, supra.* Now with reference to each of the proposed instructions which were refused.

Appellant's Proposed Instruction No. 37 (R. 17):

"You are instructed that before you can find the Defendant guilty of the charges contained in the indictment, you must first find, from the evidence, that he was wilful. The wilfulness required in a criminal action must be established by evidence that shows affirmative or positive acts on the part

of the Defendant, that, in and of themselves, spell out, specifically, bad purpose or evil motive. If you do not find such specific acts in the evidence, then you must return a verdict of 'Not Guilty'."

This instruction would not have been objectionable if restricted to the felony Counts. However, since Appellant made no effort to distinguish between the two types of offenses in his proposed instructions, the Court could do no more than to refuse the instruction as having been covered by other instructions (R. 259). And certainly the requirement of "affirmative or positive acts on the part of Defendant" is inconsistent with the definition of "willful but passive neglect of the statutory duty" as given by the Supreme Court in *Spies v. U. S., supra,* 317 U.S. at page 449. *U. S. v. Di Silvestro, supra.*

Appellant's Proposed Instruction No. 38 (R. 17):

"If you find that the filing of the returns and the payment of the taxes due were not delayed by Mr. Abdul with any bad purpose or evil motive on his part, then you must find him 'Not Guilty'."

The foregoing instruction was also refused as covered (R. 259). Again there was no attempt to distinguish between the felony and the misdemeanor Counts here, and the instruction is in the nature of a comment on the evidence inasmuch as it used the word "delayed" in connection with the filing of the returns and the words "payment of the taxes . . . by Mr. Abdul", whereas, the issue is not the delay but the

failure to file the returns when due. Also, the evidence is that the returns were *extracted* and the taxes *collected from* the Appellant and not filed and paid by him. (R. 179, 180, 184-186).

Appellant's Proposed Instruction No. 40 (R. 17, 18):

> "If you find from the evidence that the Defendant did make all tax returns required of him, even though paid late, that he did keep accurate records; that he supplied the government agents with information requested even if delayed at times; that he did eventually pay the taxes due and that he truthfully accounted for his tax liability, then the Defendant cannot have acted with bad purpose or evil motive, and if you so find from the evidence, then you must return a verdict of 'Not Guilty'."

This proposed instruction was a clear attempt to have the Court usurp the functions of the jury (R. 223). Moreover, as indicated above, it distorted the evidence in the whole record to the extent that it was in the nature of argument by Appellant's counsel in summation. If the Court were commenting on the evidence and the instruction were not written in such distorted form, and, following the summary of "facts" contained therein, if it had terminated with the words to the effect that "you should consider these facts in determining whether or not the Defendant's failure to file the tax returns was willful", rather than the direction to acquit, then it might have been appropriate. See *U. S. v. Murdock, supra.* The same comment applies to the proposed Instructions

numbered 41, 42 and 45 that follow. The invitation or direction to acquit is entirely inappropriate to this type of instruction.

Appellant's Proposed Instruction No. 41 (R. 18):

> "If you should find from the evidence that the defendant may have been impolite, crude, abrupt, trying or even irritating to any one or even all of the Internal Revenue Service employees and agents, none of these are evidence of bad purpose or evil motive or of wilfulness on the part of the defendant."

The same observations apply to the foregoing instruction as were made regarding Appellant's proposed Instruction No. 40 above.

Appellant's Proposed Instruction No. 42 (R. 18):

> "If you find that it was the intention of Mr. Abdul to pay the taxes due when sufficient funds were available, then you must find him 'Not Guilty' of each and every count of the indictment."

This is an incorrect statement of the law. *Yarborough v. U. S., supra,* 230 F.(2d) at pages 60-61; *U. S. v. Di Silvestro, supra,* 147 F.Supp. at page 304.

Appellant's Proposed Instruction No. 45 (R. 19):

> "If you find from the evidence that the Defendant did disclose his true tax liability, then this is evidence that the necessary criminal wilfulness on his part was not present, and you must find him not guilty."

To the foregoing instruction the trial judge stated: "I do not think 45 is a correct statement of the law

applicable to the facts of this case." (R. 226). This is a complete and utter distortion of the evidence since the Defendant did not disclose *any* tax liability.

Appellant's Proposed Instruction No. 46 (R. 19):

> "Before you can find the Defendant guilty of wilfulness you must be certain that the evidence shows specific intent, that is, you must be able to point to the specific acts which constitute the acts of wilfulness; if you cannot do so, then you must find the Defendant 'Not Guilty'."

This instruction was also refused as covered (R. 259). Moreover, as proposed, the instruction is not a correct statement of the law since it confuses the evidence with respect to willfulness with the question of specific intent. The Court gave the proper instruction on the question of specific intent (R. 268). It is also questionable whether specific intent, as it is properly defined in the law, is required in a "failure to file" or misdemeanor tax case. "Ignorance of the law is no defense to crime, except that, where wilfulness is an element of the crime, ignorance of a duty imposed by law may negative willfulness in failure to perform the duty." *Yarborough v. U. S., supra,* 230 F.(2d) at page 61. In that case the Court also approved the refusal of the trial judge to charge that ignorance of the law would constitute a defense to the charges contained in the indictment. 230 F.(2d) at page 60. See also *Forster v. U. S., supra,* 237 F.(2d) at page 621.

It is conceded that an instruction in the form of that given in the *Yarborough* case and approved by the Fourth Circuit at 230 F.(2d), page 60, would have

been appropriate in this case. But no such instruction was offered. Moreover, the trial judge, as previously indicated, went on record as declining to comment upon the evidence, which he had the full right to do, and further so advised the jury. For this reason the adequacy of the instructions as given in the abstract with respect to the definition of "willfulness" must be the determining criterion. Since it has been demonstrated that they were legally sound and correct, there can be no finding of error in failure to give other proposed instructions which were refused on valid grounds as either unsound in law or already covered.

In summary, Appellant acknowledges that the term "willful" may have different meanings in different contexts, but goes on to argue as a matter of statutory construction that Congress must have intended that it have the same meaning in two consecutive sections of the same Act (Sections 2707(b) and (c), Internal Revenue Code of 1939, and Sections 7202 and 7203, Internal Revenue Code of 1954), even though the offenses involved are separate and distinct and are misdemeanors in one section and felonies in the other (Br. 27). But as we have demonstrated the Supreme Court in the *Spies* case has clearly set the pattern of distinction between the two types of willfulness. 317 U.S. at pages 497-499; and *U. S. v. Di Silvestro, supra,* 147 F.Supp. at page 304.

II.

THE COURT PROPERLY GAVE THE GOVERNMENT'S REQUESTED INSTRUCTION NO. 22 TO THE JURY.

Appellant's Requested Instruction No. 22 (R. 25):

> "The importance of your duties as jurors requires that you consider the right of the Government of the United States to have its laws properly executed, and that it is with you citizens selected from this District that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty you might just as well strike the laws from the statute books."

Objection was made to the giving of this instruction on the ground that it was more in the nature of comments and conclusions rather than instructions as to the law (R. 252), and that it was contrary to the law applicable and principally in tax cases (R. 283). No objection was made at the trial that the instruction constituted an invasion of the province of the jury and was an invitation, if not a direction to convict as the Appellant now argues. (Br. 28). Since this objection was never called to the attention of the trial judge, it is obvious that he had no opportunity to scrutinize the instruction in that light and to amend it accordingly if he considered it necessary. The ground for objection urged on appeal must be the same as that presented to the trial Court. *Bartlett v. U. S.*, 10 Cir. 1948, 166 F.(2d) 920, 927.

In any event the instruction was not in any way improper, particularly when considering it in light of all the other instructions and the evidence in the case.

In *U. S. v. Witt,* 2 Cir. 1954, 215 F.(2d) 580, 585, the Court held that the following instruction did not erroneously appeal to the jury to convict:

> [Footnote 4]
> "Now, ladies and gentlemen, if you find that the evidence respecting the defendants, or a defendant, is as consistent with innocence as with guilt, such defendant or defendants should be acquitted. If you find that the law has not been violated, you should not hesitate for any reason to find a verdict of acquittal. But, on the other hand, if you find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty, as a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this."

The similarity of the two instructions is at once apparent.

In *U. S. v. Link,* 3 Cir. 1953, 202 F.(2d) 592, 594, cited by Appellant (Br. 28), the charge complained of was as follows:

> " . . . But if on the other hand you find that the law has been violated as charged in this indictment, then you should not hesitate, because of sympathy, prejudice or any extraneous consideration of any kind, to render a verdict of guilty as a clear warning to all that crime cannot be committed with impunity in the United States and go unpunished. THE PEOPLE OF THIS STATE AND OF THE UNITED STATES ARE ENTITLED TO BE ASSURED OF THIS CONVICTION." (Emphasis supplied.)

The Court held that only the capitalized portion of the charge, that is, "the people of this State and of the United States are entitled to be assured of this conviction", was prejudicial to the defendant and, therefore, erroneous. By inference, therefore, the Court approved the balance of the instruction and it is also quite similar to the instruction given in this case.

The case of *Billeci v. U. S.,* D.C. Cir. 1950, 184 F. (2d) 394, cited by the Appellant (Br. 28), is not in point. There the trial Court had charged the jury in essence that if they believed the Defendants had committed the crime of which they were charged, they should find a verdict of guilty but if they did not believe that the defendants had committed the crime, they should find a verdict of not guilty. The Appellate Court said that statement was not the law since it failed to incorporate the element of reasonable doubt. 184 F.(2d) at page 399. A second instruction held to be erroneous by the Appellate Court was in effect a direction to the jury to bring in a verdict. 184 F.(2d) at page 401.

But even if the instruction taken alone were found to be erroneous, no ground has been established for reversal as a result thereof since no injury has been shown. Rule 52(a), Federal Rules of Criminal Procedure, U.S.C.A. The entire charge to the jury must be examined in order to determine whether the error, if any, was harmful.

An examination of the instructions shows that the instruction complained of was given in conjunction

with lengthy charges regarding reasonable doubt, the presumption of innocence and the Government's burden of proof in criminal cases (R. 264, 273-274, 277-278). Furthermore, the instructions concluded in the following manner (R. 281-282):

> "If the accused be proved guilty, say so. If not proved guilty, say so. Remember at all times that a defendant is entitled to acquittal if any reasonable doubt remains in your minds.
>
> "Remember also the question before you can never be, will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty."

Surely these concluding paragraphs cured any possible invitation to convict, which might have been inherent in the single paragraph Appellant complains of.

The burden to show reversible error is on the Appellant. *U. S. v. Reed,* 2 Cir. 1938, 86 F.(2d) 785, 786, cert. den. 305 U.S. 612. And when guilt is clearly established by competent evidence, error in the charge to the jury which does not affect the substantial rights of the accused does not call for the reversal of a conviction. *U. S. v. Amadio,* 7 Cir. 1954, 215 F.(2d) 605, 614, rev. on other grounds 348 U.S. 892; *Schwartz v. U. S.,* 9 Cir. 1947, 160 F.(2d) 718, 720.

III.

THE COURT PROPERLY REFUSED TO STRIKE THE TESTIMONY OF JAMES WALKER.

After establishing the corpus delicti the Government called James Walker to testify to a conversation held with the Defendant on February 1, 1955 during the period encompassed by the Indictment. He testified that the Defendant was trying to collect a debt which he owed him, and that he advised the Defendant that he was not in a position to pay because he was indebted to "Uncle Sammy" for some excise taxes which he was paying off monthly, and that his first obligation was to the Federal Government. He stated that the Defendant replied (R. 176):

> "I don't give a damn for Uncle Sammy. I come first and I will get my money before Uncle Sammy and I have ways of doing it."

Appellant moved to strike on the ground that the testimony was immaterial and irrelevant (R. 177). When this motion was denied Appellant moved for a mistrial, which motion was also denied.

Appellant assumes a conclusion when he states that an expression of disregard for another taxpayer's debtor relationship to the United States is not pertinent when made by one on trial for alleged tax offenses (Br. 29). Although he makes no argument in support of his conclusion, he perhaps reasons mistakenly that the jury could not fairly infer from the quoted testimony that Appellant was contemptuous of the public revenue and of every citizen's duty to pay his fair share of the national tax burden.

Certainly Appellant cannot be contending that such a state of mind is irrelevant to the issue of willfulness in his failure to fulfill his own tax obligations.

If, then, the question is whether the jury can be permitted to draw an inference as to Appellant's state of mind from the witness Walker's testimony, the answer is clear. The Appellant's statement, "I don't give a damn for Uncle Sammy", is a direct expression of his state of mind. Further, his statement, "I come first and I will get my money before Uncle Sammy and I have ways of doing it," is strong circumstantial evidence that Appellant was contemptuous of the Revenue laws.

Essentially what Appellant is complaining about is the trial court's exercise of discretion in determining that the proferred testimony was admissible because it was sufficiently related to the issue of willfullness to be of some help to the jury in determining Appellant's state of mind.

A party's statements are always competent evidence against him unless they fall within some special exclusionary rule. Where they have been received in evidence, the fact that they may have only remote relevance to the issue being tried is not ground for reversal unless they are such as are clearly apt to have confused the jury's mind or to have improperly swayed its judgment. *Peoples Loan and Investment Co. v. Travelers Insurance Co.,* 8 Cir. 1945, 151 F.(2d) 437, 440. Much discretion is left to the trial court, and its ruling on the admission of evidence should be sustained if the testimony which is admitted tends

even remotely to establish the ultimate fact. *Clune v. U. S.*, 159 U.S. 590, 592-593; *Gordon v. U. S.*, 6 Cir. 1947, 164 F.(2d) 855, 860; 20 Am. Jur., *Evidence*, § 247.

IV.

THE COURT PROPERLY OVERRULED APPELLANT'S OBJECTIONS TO CERTAIN QUESTIONS ASKED HIM ON CROSS-EXAMINATION AND PROPERLY REFUSED TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 54.

Appellant complains strenuously of certain questions asked him on cross-examination about the conduct of his business out of which the tax delinquencies arose, but the basis of his complaint is wrapped in mystery. After a thorough study of his argument (Br. 30-33) we are unable to find any cogent reason stated for this specification.

Appellant recognizes that the questions about his dishonest business practices were addressed to his credibility as a witness and for the purpose of impeachment. He complains that the Government did not offer any evidence of those practices in rebuttal. Leaving aside the anomaly inherent in his complaint that prejudicial evidence was not offered against him, we note that the Appellant himself states the obvious answer to his own objection, i.e., that impeachment on a collateral matter was involved, and in such a case the witness' denials of impeaching facts may not be contradicted by rebuttal evidence. *Herzog v. U. S.*, 9 Cir. 1955, 226 F.(2d) 561 (Br. 33).

Thus we find the Appellant in the curious position of complaining that the Government failed to introduce evidence prejudicial to him and simultaneously offering authority for the proposition that the evidence would not be admissible if offered.

Of course the well settled rule is that on cross-examination, for impeachment, a witness may be questioned concerning his dishonest practices, since his dishonesty bears on his credibility as a witness. But since the credibility of a witness is a collateral matter, the inquiry by cross-examiner is foreclosed by the witness' answer. *Simon v. U. S.,* 4 Cir. 1941, 123 F.(2d) 80, 85. This rule is well stated in *Rau v. U. S.,* 2 Cir. 1919, 260 Fed. 131, 136:

> "When the defendant took the stand as a witness, he assumed a dual capacity; that of a defendant and that of a witness. As a witness, it was competent for the government to interrogate upon any competent subject for the purpose of impeaching his credibility as a witness, and in doing this, might enter the field of matters collateral to the main issue; but they were bound by the answers, and were not permitted to call witnesses in rebuttal tending to show that the defendant was guilty of crimes other than charged in the indictment. (Cit.) To permit this testimony violated his rights as a defendant, for it charged him with other crimes for which he was not indicted or on trial."

The *Rau* case is directly in point here. There the defendant had taken the stand to testify in his own behalf and on cross-examination was questioned about his dishonest business practices. The conviction was

reversed not because of the questions asked but because the Government did there what it is accused of not doing here: it offered rebuttal evidence to contradict the defendant's denials of dishonest practices.

The cases cited by Appellant are of similar tenor. In *Herzog v. U. S., supra,* 226 F.(2d) at page 565, defendant had sought to impeach one of the Government's witnesses by questioning him on cross-examination about his troubles with the OPA. Subsequently he sought to introduce evidence to contradict the witness' denials. The evidence was excluded as an attempt to impeach on a collateral matter.

It will be noted that in both the *Rau* and *Herzog* cases the courts recognized that the questions asked of the witness were proper cross-examination.

Bloch v. U. S., 9 Cir. 1955, 221 F.(2d) 786, 790, cited by Appellant, is not in point here. The questions complained of there involved the morals of the Defendant, and were relevant to neither the issues of the case nor the credibility of the witness.

The Appellant here, unlike the Defendant in *Bloch,* had already put his character in issue (R. 278-280). Consequently, even the questions asked in the *Bloch* case might have been proper here. See also *Michelson v. U. S.,* 1948, 335 U.S. 469. Nevertheless, the cross-examination was restricted to matters relating specifically to his practices in the business out of which his tax delinquencies arose.

Since the questions were proper, certainly the Defendant's requested Instruction No. 54 was erroneous and was properly refused by the trial judge. Again

Appellant would undoubtedly have been entitled to an appropriate instruction on this subject, but none was offered. (See the discussion on this subject in Argument I above.)

Nevertheless, the Court did instruct the jury adequately in the following words (R. 273):

> "The defendant here is to be tried only on the evidence which is before the jury and not upon suspicions that may have been elicited by questions of counsel, or answers which were not permitted."

CONCLUSION.

It is respectfully submitted that the trial court did not err in any matter brought before it in the trial of this case, and that judgment of that court should be affirmed.

Dated, Honolulu, T.H.,
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